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IN THE

Supreme Court of the United States

THOMAS VAN ORDEN,

Petitioner,

v.

RICK PERRY, in his official capacity as Governor of Texas and Chairman, State Preservation Board, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN JEWISH CONGRESS, ON BEHALF OF ITSELF, THE AMERICAN JEWISH COMMITTEE, AMERICANS FOR RELIGIOUS LIBERTY, JEWISH COUNCIL ON PUBLIC AFFAIRS, UNION FOR REFORM JUDAISM AND THE CENTRAL CONFERENCE OF AMERICAN RABBIS, IN SUPPORT OF PETITIONER

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STATEMENT OF THE CASE

Amici adopts the statement of the Petitioner.

STATEMENT OF FACTS

Amici adopts the statement of the Petitioner.

SUMMARY OF ARGUMENT

1. The arguments of Respondents depend on the assumption that the Ten Commandments on display at Texas' Capitol is non-controversial and non-denominational document, whose function is either to honor the Fraternal Order of Eagles or to mark the Commandments' role as a foundation of American law.

2. The claim that the monument is a tribute to the Eagles is belied by the fact that the monument notes that it was donated by the Eagles to the people of Texas, not the other way around. The claim that the monument celebrates the foundational role of the Commandments is simply false as a matter of history.

3. The court below assumed that it was possible to talk sensibly about the Ten Commandments. It is not. There are multiple versions of the Commandments, multiple translations, and multiple views of whether the Ten Commandments have any special theological significance and what that significance might be.

4. In every case, the monument at issue adopts a view of the Commandments rooted in the Christian tradition, and within that broad tradition, the Protestant tradition:

(a) The text of the Commandments is taken from the Protestant King James Bible;

(b) The enumeration of Commandments is followed by Protestant Christians. The First Commandment is the ban on other Gods. Almost all Jews, however, count "I am the Lord, etc." as the First Commandment. Jewish theologians—but not Christian ones—debate the meaning of that Commandment.

(c) Catholics treat the ban on graphic images as part of the ban on worshipping idols, interpreting that ban as applying only to images which are worshipped as gods, Protestants and Jews view these as separate commandments. That dispute resonated through the Reformation. It is still manifest in the differences between a Baptist church and a Catholic cathedral, or a synagogue and a Russian Orthodox church.

(d) The Sixth (or Fifth) Commandment as translated by Jews bans murder, but Protestants (and Texans) read it as a ban on all killing. That stark difference plays out contemporaneously in debates over capital punishment, abortion and war.

(e) The very fact that the Commandments are singled out for display as a "foundation of American law" reflects a Christian emphasis on the unique and lasting import of the Commandments as law, a view wholly alien to Jews. The monument notably omits the particularistic phrase "who has taken you out of Egypt," a phrase more consistent with a Jewish convenental reading of the Commandments than the universalist one Respondents defend.

(f) Moreover, the Commandments are alien to the religious traditions of American Buddhists, Hindus and Native Americans, to say nothing of atheists.

5. On each of these points, the monument reflects Christian, indeed Protestant Christian, understandings. It is thus a generic, non-denominational statement of "civic religion," but a profoundly sectarian statement.

6. The sectarian statement speaks for itself in the manner of *res ipsa loquitor*. It is an endorsement of one set of religious beliefs over others. The burden should fall on Respondents to explain that the Commandments are not what they appear to be. There are circumstances where they could make that showing, as in an art museum or a textbook, but they have not done so here.

ARGUMENT*

INTRODUCTION

For the first time since *Stone v. Graham*, 449 U.S. 39 (1980), this Court confronts a permanent display by government of an unambiguously religious symbol. The court below found this display constitutional. *Amici* believe that *Stone* is controlling. Here, as there, the purpose and effect of the display was to urge reverence for, and compliance with, the Ten Commandments.

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* Pursuant to Rule 26.1, the undersigned certifies that no one other than the *amicus* and their counsel, participated in the drafting of this brief, nor did any other person help pay for its production or filing.

A state itself may not engage in religious speech, as Texas has done here. *Widmar v. Vincent*, 454 U.S. 263, 271, n. 9 (1981); *Good News Club v. Milford Central School District*, 533 U.S. 98, 114 (2001). These Ten Commandments are owned by the State of Texas, displayed at its Capitol, and speak with its voice.

Texas can argue only that (1) *Stone* should be overruled because Commandments displays are not perceived as inherently religious; (2) the way the Commandments are displayed dispels any governmental endorsement; (3) the constitutional offense is *de minimis*; or (4) the Commandments, like the legislative prayers in *Marsh v. Chambers*, 463 U.S. 783 (1983), benefit from an exception to general Establishment Clause rules.

Accepting the first argument means both denying the obvious and converting to public, secular use a statement of core religious commitments. The second defense, that Texas has carried its burden of dispelling the natural inference that arises from the Commandments' display, is not persuasive here. See Point III, *infra*. The third, the *de minimis* defense, has never been accepted by this Court, as Justice O'Connor pointedly observed in her concurrence in judgment in *Elk Grove U.S.D. v. Newdow*, 542 U.S. ___, ___ (2004) and will not be treated further. The Commandments are not credibly treated as possessing only *de minimis* religious significance. The *Marsh* "historical practice" exception also cannot save Respondents' display, as we demonstrate in the next section.

I. THE TEN COMMANDMENTS DO NOT QUALIFY FOR AN "HISTORIC EXCEPTION"

A. Ten Commandments Displays Do Not Have A Long Pedigree

The display of the Commandments cannot be saved by reference to an "unambiguous and unbroken" history of long-standing usage, *Marsh v. Chambers*, *supra*, 463 U.S. at 792 and *Walz v. Tax Comm'n*, 397 U.S. 664, 676-77 (1970).

Officially sanctioned and permanent displays of the Ten Commandments on public property are a relatively recent addition to the official American landscape. Anson Phelps Stokes' magisterial survey of the intersection of religion and law, Church and State in the United States (1950), makes no mention of such displays, other than passing references to a North Dakota statute requiring the posting of the Commandments in public school classrooms. That remained the situation when Stokes' work was abridged and updated several years later, A.P. Stokes and L. Pfeffer, Church and State in the United States (1954). Pfeffer's own comprehensive volume, Church, State and Freedom (2d edition, 1967), likewise said little about Ten Commandments displays.

Professor Phillip Hamburger's recent wide-ranging survey of nineteenth century church-state controversies, P. Hamburger, Separation of Church and State (2002), rejects the doctrine of "strict separation." Although reporting on earlier debates and controversies anticipating current ones, it says nothing of official Ten Commandments displays.

With but three exceptions—two from Pennsylvania in which the Third Circuit[1] dealt with Ten Commandments displays dating to the early 1920's, and one in which the Eleventh Circuit[2] confronted an official seal dating to 1872, (displaying tablets on which no text was engraved), the reported cases deal with monuments erected no earlier than the 1950's. Many of the reported cases involve contemporaneous efforts whose religious purposes are at best ill disguised. *Glassroth v. Moore*, 347 F.3d 916 (11th Cir. 2003). By contrast, legislative prayers were a tradition in Congress from the founding, *id.*, 787-88; and for equally long periods in most state legislatures, *id.* at 789, n. 11.

B. The Display Of The Commandments Have Engendered Significant Controversy

It also cannot be said, as it was in *Marsh*, and as it might be said of the phrase "under God" in the Pledge of Allegiance, that the practice of displaying the Ten Commandments is an "unbroken [one] ... which has been employed pervasively without engendering significant controversy," *Newdow*, *supra*, 542 U.S. at ___ (O'Connor, J., concurring in judgment), citing *Walz v. Tax Comm'n*, *supra*, 397 U.S. at 698.

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[1] *Modrovich v. Allegheny County*, 385 F.3d 397 (3rd Cir. 2004); *Freethought Society v. Chester County*, 334 F.3d 247 (3rd Cir. 2004).

[2] *King v. Richmond County*, 331 F.3d 1271 (11th Cir. 2003).

In *Newdow*, Justice O'Connor noted that a fifty-year period of "quiet and general acceptance" of civic use was not "inconsiderable." These displays have not, however, enjoyed "quiet and general" acceptance.

The phrase "under God" in the Pledge of Allegiance had been recited daily in tens of thousands of public schools and by millions of children and adults. Ten Commandments displays have been under legal assault since *Anderson v. Salt Lake City Corporation*, 475 F.2d 29 (10th Cir. 1973); *Ring v. Grand Forks* (1980) and *Stone v. Graham* (1981). Respondents acknowledged the scope of the controversy in urging that this Court grant certiorari.

The period in which such displays were accepted without challenge is thus less than half the 50 years in *Newdow*. The accompanying controversy is also more prolonged and more intense than the controversy surrounding the Pledge. It has even generated demands for display of competing messages. *Summum v. City of Ogden*, 297 F.3d 995 (10th Cir. 2002). Unsuccessful legislative efforts to overturn decisions barring official Commandments displays have persisted.[3]

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[3] See, e.g., just in Congress, H. Con. Res. 51 (105th Cong. 1st Sess. 1997) (criticizing *Glassroth v. Moore*); H.R. 4922, First Amendment Restoration Act (107th Cong. 2nd Sess.) (criticizing *Stone* and *Ring*, and stripping federal courts of jurisdiction); H.R. 3895 (107th Cong. 2nd Sess.) (display of Ten Commandments within reserved power of states); H.R. 2045 (108th Cong., 1st Sess.) (same); H.R. 3190 (108th Cong., 1st Sess. 2003) (same); S.1558 (108th Cong., 1st Sess. 2003) (same); H. J. Res. 46 (108th Cong., 1st Sess. 2003) (constitutional amendment to permit, *inter alia*, display of Ten Commandments); H.J. Res. 297 (101st Cong.

II. THE TEN COMMANDMENTS ARE INTENSELY RELIGIOUS—AND RELIGIOUSLY CONTESTED

The court below invoked a potpourri of reasons to disregard the ineluctably religious nature of the Commandments. It (1) ignored the religious import of the first four Commandments, which are, as this Court has held, *Stone*, *supra*, and as anyone can see, ineluctably religious. "The Commandments do not confine themselves to arguably secular matters.... Rather, the first part of the Commandments concern the religious duties of believers," *Stone v. Graham*, *supra*, 449 U.S. at 41-42; *City of Elkhart v. Book*, 532 U.S. 1058 (2001) (Stevens, J., concurring in denial of certiorari); *cf. Murrow Indian Orphans Home v. Childers*, 197 Okla. 249, 258, 171 P.2d 601 (1946); (2) failed to acknowledge the dispositive difference between a temporary Christmas display celebrating a holiday with mixed religious and secular components *Lynch v. Donelly*, *supra*, and a permanent, freestanding religious one, *County of Allegheny v. ACLU*, 492 U.S. 573, 606-07 (Blackmun, J.) (1989); *id.* at 629 (O'Connor, J.); *id.* at 661, 664-65 (Kennedy, J.); (3) conjured up a right to government endorsement of some forms of religion lest government be perceived as hostile to religion, 351 F.3d at 178-181, a claim

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1st Sess. 1989) (constitutional amendment); H. Con. Res. 31 (105th Cong., 1st Sess. 1997) (resolution adopted urging right to display of Ten Commandments); H.R. 1501, amendment 200 (106th Cong. 2d Sess.) (declaring display of Ten Commandments reserved power of states; amendment passes 248-180) . None of the substantive proposals were enacted into positive law, although several resolutions on the subject were adopted.

repeatedly rejected by this Court, *e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 271, n. 9 (1980); and *School Dist. of Abington Twshp. v. Schempp*, 374 U.S. 203, 225-26 (1963); and (4) referenced, without supporting citation, the Commandments' supposed contribution to American law.

A. There Is No Merit To The Claim That The Commandments Are The Foundation Of American Law

Without any citation of legal or historical authority, the Fifth Circuit claimed that the Commandments are the foundation of American law, 351 F.3d at 181. See also, *City of Elkhart v. Book*, *supra*, 532 U.S. at 1059, 1063 (Rehnquist, C.J., dissenting from denial of certiorari). A careful study has demonstrated that claim to be greatly exaggerated. S. Greene, The Font Of Everything Just And Right: The Ten Commandments As A Source Of American Law, 14 J.L. REL. 525 (1999-2000).

A computerized search of state and federal decisional law discloses that there are rhetorical references to the Ten Commandments in judicial opinions. Only rarely did a case turn in any serious way on the substance of the Commandments. There were nineteenth century cases upholding Sunday Blue Laws on the ground that the Ten Commandments commanded a day of rest, see *ACLU v. Ashbrook*, 375 F.3d 484, 507 (6th Cir. 2004) (Batchelder, J., dissenting) (collecting cases), but those holdings were discredited by this Court's Sunday Blue Law cases, *McGowan v. Maryland*, 366 U.S. 420 (1960), and earlier decisions, *e.g.*, *Komen v. City of St. Louis*, 316

Mo. 9, 18, 289 SW 838 (1926); Borden, Jews, Turks and Infidels (1984).

B. The Commandments Have None Of The Attributes Of Civic Deism

In evaluating whether Texas' permanent display of the Ten Commandments communicates a religious message, the place to begin is with the obvious. The Commandments are not a marginal or generic religious symbol, such as might fall under the rubric of ceremonial deism, devoid of intense and particularistic religious meaning. *Elk Grove*, *supra*, 542 U.S. at ___ (O'Connor, J., concurring in judgment); *Marsh v. Chambers*, *supra*, 463 U.S. at 810-11 (Brennan, J., dissenting).

The religious references upheld under the rubric of ceremonial deism, as Justice O'Connor has emphasized, "possess[], and transmit[]" more "a civic than religious" meaning. *Elk Grove*, *supra*, 542 U.S. at ___. The Fifth Circuit understandably did not attempt to shoehorn the Commandments into this shoe that does not fit.

The legislative prayers upheld in *Marsh v. Chambers* made no reference to any specific faith, a fact crucial to their constitutionality, *ACLU v. County of Allegheny*, *supra*, 492 U.S. at 602-03. ["H]owever history may affect the constitutionality of nonsectarian references to religion ... history cannot legitimate practices that demonstrate the government's allegiance to a particular sect or creed." Cf., *Larsen v. Valente*, 456 U.S. 228 (1982) (most basic principle of Establishment Clause is inter-faith neutrality). The same generic quality is evident in "In God We Trust"

or "One Nation under God." It is not true of the Ten Commandments.

(i) The Commandments as a unit, and some of them individually (the Jewish first four), are not generic religious references. They are intensely sectarian statements, amounting to a binding dogmatic statement of faith and morals. The validity and meaning of these commands divide religious groups (using that term broadly to include those who reject divinely inspired ethical rules), see, *infra*, Point II (B)(ii) and (iii).

(ii) The Commandments retain a central place in the religious traditions which accept them. Civic pieties play little role in institutionalized religion.

(iii) The effect of placing the Commandments on public display was, and is not, to acknowledge their place in shaping American law. It is, rather, to communicate the State's desire that its citizens accept the "moral code" embodied in the Commandments. It is therefore a form of forbidden, albeit passive, proselytizing, and of "prescrib[ing] what shall be orthodox in religion...." *Bd. of Education v. Barnette*, 319 U.S. 624, 642 (1943).

(i) The Commandments Are Intensely Sectarian Statements

Discussion of the religious nature of the Commandments is superfluous. This Court held it to be so in *Stone*. For argument sake, though, we write as if *Stone* had not been decided.

The Ten Commandments are according to the twin biblical accounts, Exodus 20:2 and Deuteronomy 5:6, not minor elements of a larger religious code.

They are the public expression of a theophany with Moses and the people he led, Exodus 19 and Deuteronomy 5, in which God enters into a covenant with that people. *Cf.*, Exodus 24:7; W.G. Plaut, The Torah: A Modern Commentary To Exodus at 220 (1983) ("The Ten Commandments are rooted in the covenant relationship").

To this day, the Ten Commandments as they appear in Exodus 20, together with the prelude in Exodus, chapter 19, which places the Commandments in the context of a religious experience, are read in synagogues on the Feast of Pentecost, a holiday which traditionally commemorates the theophany at Sinai. In many, but not all, synagogues, the Commandments are also displayed over the Ark holding the Torah scrolls.[4]

Jewish authorities beginning no later than Nachmanides, a well known Spanish exegete of the 13th century regard the Commandments as the text of the Covenant with Israel. Modern scholars agree. "This is not a code of detailed laws. This is a formulation of … conditions required for membership in the community." M. Weinfeld, *The Uniqueness of the Decalogue* in B.Z. Siegel, The Ten Commandments In History And Tradition, at 9 (1990) (hereafter "Siegel, Ten Commandments").

The Catholic tradition, by contrast, accords the Commandments special pride of place as the word of

[4] There is no evidence of the Ten Commandments in synagogues of antiquity. "Up to the end of the Middle Ages, Jews did not use the Tablets as a symbol and did not even depict them in drawings." G.B. Sarfati, *The Tablets As A Symbol Of Judaism* in B.Z. Siegel, The Ten Commandments In History And Tradition (1990) 383-85.

God itself, untainted by transmission through human hands—*i.e.* Moses. At least since the Council of Trent, the Decalogue has been one of the pillars of catechesis. "The Decalogue contains a privileged expression of the natural law." (Catechism, ¶ 2070).

John Calvin likewise described them as "the true and eternal rule of righteousness for all who wish to conform their lives to God's will." J.W. Farley, John Calvin's Sermons on The Ten Commandments at 24 (1980), citing Calvin's Institutes ("Calvin, Sermons"). As Calvin further explained (*id.* at 240):

> All we have to do is count our fingers and we have the commandments of God, we have the sum of what we ought to remember in order to be God's good pupils.

The Jewish tradition accords the Ten Commandments no greater significance than any other commandment. G. Sarfati, *The Tablets As A Symbol Of Judaism*, in Siegel, Ten Commandments, *supra* at 383-385. A noted scholar of the Jewish roots of Christianity has observed, "[f]rom the time of the earliest Fathers of the Church, Christianty assigned an even more exalted position to the Decalogue than Judaism did." D. Flusser, *The Ten Commandments and the New Testament*, in Siegel, Ten Commandments, *supra*, at 219.

The Ten Commandments are not now a regular part of Jewish liturgy. They were recited daily in the Second Temple. Mishna Tamid 5:1. The rabbis decided against replicating that practice outside the Temple. The Talmud explains that "heretics"—a reference to early Christians, M. Greenberg, *The*

Tradition Critically Examined, in Siegel, Ten Commandments, *supra*, at 117-19—emphasized their importance as an exclusive statement of man's obligations to God.

This concern exactly captures early Christian understandings of the Commandments as the residuum of the law. See Hasdai Crescas (c. 1340-1410). The Refutation of Christian Principles, (D.J. Lasker, ed.) 26, 74-75 (1992). See Calvin, Sermons, *supra*, at 249. Matthew 19: 16-20 ascribes to Jesus a citation of the Commandments in truncated form, with the addition of the command of Leviticus 19 to love one's neighbor—and the omission of the Commandments *Stone* denominated "religious." *Stone v. Graham*, *supra*. See, G. Easterbrook, *Let's Display The Six Commandments*, www.tnr.com/easterbrook.mhtml?pid=927 (11.04.02).

The Protestant tradition particularly emphasized the central importance of the Ten Commandments. In Reformed Protestant churches, images of saints were replaced with "often exuberantly, floridly framed Biblical texts, plus big boards bearing the three that all Protestants should know by heart: Nicene or Apostle's Creed; the Ten Commandments; and the Lord's Prayer." D. MacCulloch, The Reformation: A History (2004) at 541 (hereinafter "Reformation: A History"). Queen Elizabeth in 1561 directed that the Commandments be posted on walls of the English churches for the religious edification of her subjects. J. Phillips, The Reformation Of Images: Destruction Of Art In England (1973) 129, 136.

(ii) Displaying The Ten Commandments Expresses An Unacceptable Preference For Judeo-Christian Faiths

Respondents' monument represents the faith statement of one group of faiths, but not others. It has been said that the Koran (Quran) accepts all of the Commandments in substance, see I.A. Arshed, *Islam Supports Bible's Ten Commandments*, www.islam101.com/religion/TenCommandments/tcQuran.htm. However, it does not treat them as a unit of special theological significance, and it omits the opening phrase (or Commandment ("I am the Lord … who took you out of Egypt."[5]) (Emphasis added.)

The Commandments are also not part of faiths new to Americans—Hinduism, Buddhism, Shintuism, Confucianism and yet others. These traditions which once may have been demographically insignificant, but which are today a growing part of the American religious mosaic, could not accept a prohibition on either graven images or idols. They are not monotheistic, a criterion accepted by all Judeo-Christian interpretations of the Commandments. Likewise, the Commandments are not part of the original faith of Native Americans.

If the Ten Commandments displays truly represent the foundation of American law, not only as

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[5] The reference to the Exodus as a reason for observing the Sabbath is also omitted from the command on the Sabbath. Koran 4:154. Arshed suggests that the Koran denies that, as the Bible has it, God "rested" on the seventh day. Koran 2:255. The Koran also rejects the Bible's insistence that God visits the sins fathers on the third or fourth generation. Koran 6:160.

it once was, but as it is—and nothing on the displays suggests a purely historical focus—then the message the displays sends the reasonable observer is that citizens who do not accept a ban on idolatry or graven images are not Americans true to the origins and foundational beliefs of the society. The necessary and inescapable conclusion is that they are outsiders whose faiths are officially disfavored.[6]

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[6] Former Alabama Chief Justice Roy Moore displayed a Ten Commandments monument in the Alabama Supreme Court to reject Buddhism and Hinduism. *Glassroth v. Moore*, 229 F.Supp.2d 1290, 1313 (M.D. Ala. 2002), affirmed, 325 F.3d 1283 (11th Cir. 2003). *Cf.*, *McGinley v. Houston*, 361 F.3d 1328 (11th Cir. 2004) (rejecting claim that removal of Ten Commandments would establish non-Judeo-Christian faiths).

See also an interview of Rev. James Dobson by Larry King, September 5, 2003:

> KING: If the chief judge of a court were Muslim, and put up a Muslim creed, would that be OK with you?
>
> DOBSON: It would not be OK with me …
>
> KING: Why not?
>
> DOBSON: Because that's not true—that's not the historic foundation of our country.
>
> KING: So you're saying we're a Judeo-Christian country? What right then do non Judeo-Christians have? Don't they have the same rights as you?
>
> DOBSON: The beautiful thing, Larry, about the Judeo-Christian system of values is that it provides freedom. Freedom to worship however you want to or freedom not to worship at all. If the Islamic law were the law of this land, there would not be that freedom. And if you don't believe that, look at the countries where Islamic law rules.
>
> http://transcripts.cnn.com/Transcripts/0309/05/lkl.00.html

Any emphasis on the Judeo-Christian tradition also excludes the growing group of American "seculars," including atheists, now about a tenth of the population. Fourth National Survey of Religion and Politics, University of Akron (2004). For these citizens, human reason, not revelation or divine inspiration, is the source of morals and political choices. Many of them believe it dangerous to think otherwise. See, S. Jacoby, Freethinkers: A History of American Secularism (2004).

The message of exclusion sent by the monument may not have been obvious when it was erected. The recognition that the United States was not a (Protestant) Christian country, but a Judeo-Christian one was in the 1950's a marked step in the direction of religious toleration. W. Herberg, Protestant, Catholic, Jew; An Essay in American Religious Sociology (1988).

As the society as a whole grows more religiously diverse, and, it must be said, secular, the import of the display becomes correspondingly more substantial. A practice sectarian in origin can become secularized over time, see, *e.g.*, *McGowan v. Marlyand*, 366 U.S 420, 477, 503-05 (1961) (Sunday Blue Laws). By a parity of reasoning, a thing that was once secular can take on a sectarian hue by changed circumstances.

In the 1950's, given the more profound endorsements of Judeo-Christianity by government, a Ten Commandments display might not have signaled that some citizens were preferred and others disfavored, *County of Allegheny v. ACLU*, *supra*, 492 U.S. at 595-97. Today, that is not the case. It is

precisely the urgent need to signal just that message that fuels the contemporaneous explosion in Commandments monuments. See, *e.g.*, n. 10, *supra*.

(iii) The Theological Disputes Over The Commandments Are Not Limited To General Questions Of Their Authority Or Role

Even faiths which accept the Commandments disagree in important ways over their translation from the original Hebrew. These are not obscure debates of theologians of the "how many angels can dance on the head of a pin" variety. Respondents consistently chose one version, reflecting one theological point of view.

The attached chart (Appendix A) summarizes the differences between faiths in listing and interpreting the Commandments. (That chart varies slightly from the text used on the monument because it is based on a different text of the Bible.)[7]

The Bible itself refers to ten "words," Exodus 34:28, Deuteronomy 4:13, not ten "commandments." The Hebrew text contains no punctuation or enumeration aids (*i.e.*, numbering). There are possible readings of the text which have more than ten Commandments. See M. Breuer, *Dividing the Decalogue into Verses and Commandments*, in Siegel, Ten Commandments, *supra*, at 291-330. How the Ten Commandments pericope is broken up into ten is thus dependent on what philogical, grammatical, and religious assumptions the reader makes.

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[7] The Washington Post printed a slightly different summary (October 23, 2004, B-9).

a. The First Commandment

On Texas' monument, the First Commandment is "Thou shall have no other gods before me." This is, as the chart shows, currently the uniform Christian view. It is not the view of traditional Judaism, at least since Talmudic times. See, *e.g.*, J.C. Holbert, The Ten Commandments - The Great Texts: A Preaching Commentary (2003). However, as the table shows, the early Jewish writers on the Bible, Philo and Josephus, presaged the current Christian view.

A recent translation of the Torah for use in Conservative Jewish congregations follows the usage of Philo and Josephus, Etz Hayim, p. 1017 (2001), but a recent Reform Jewish translation follows the traditional (and still Orthodox) Jewish view that the ban on idols and graven images is the Second Commandment. Christians, too, have long understood "I am" as the First Commandment for Jews. See D. MacCulloch, Reformation: A History, *supra*.

The underlying theological point—whether God has commanded belief in Himself—has generated voluminous literature. See W.J. Harrelson, The Ten Commandments And Human Rights (1997). Medieval Jewish commentators divided on the meaning of the command to believe in God. Was it an obligation to contemplate God philosophically (Maimonides), or to believe in divine intervention in human affairs ("who took you out of Egypt")? Or perhaps the phrase means, as philosopher Nathan Rotenstreich proposes, that man is "called" by God. N. Rotenstreich, *The Decalogue And Man As "Homo Vacatus,"* in Siegel, Ten Commandments, *supra* at 247-48.

Those who do not count "I am" as a commandment argue that the phrase is merely identifying the commanding authority. It is so written on the monument. That display thus sweeps away much of the Jewish tradition in favor of the Christian tradition. What else should the reasonable observer think but that the State has in this respect a preferred form of Judeo-Christianity, with a heavy emphasis on the latter?

Respondents' official text omits the phrase "who took you out of the land of Egypt from the house of slavery." That phrase suggests that the Commandments were directed to a specific people who shared a specific historical experience of suffering and oppression, and of redemption as a people at God's hand. This description of the divine giver of the Commandments would deny the universal covenantal import of the Commandments as a covenant. See J.T. Noonan & E.M. Gaffney, History, Cases and Other Materials on The Interaction of Religion and Government, pp. 6-7 (2000) (collecting sources); Rotenstreich, *The Decalogue And Man As "Homo Vacatus,"* in Siegel, Ten Commandments, *supra*.

Early Protestants were quick to note the covenantal quality of the Commandments. But for them, it was a covenant between God and all of humanity. Reformation: A History, *supra*, at 173. Given the generally (Protestant) Christian form of the displayed Commandments, it is not surprising that the monument would omit language undermining the belief that the Commandments have universal import.

(b) The Jewish Second Commandment - Prohibition Of Graven Images

As reproduced in the challenged monument, the Second Commandment is "Thou shalt not make to thyself any graven images." Catholic Bibles, however, do not list this as a separate Commandment. In those texts the prohibition on images is treated only as an aspect of the (Church's) First Commandment, a prohibition on serving other gods, including images which are worshipped as separate divinities.

On the Catholic understanding, this Commandment does not forbid the making or possession of images of the true God. Protestants and Jews, while disagreeing on the exact form of the Commandment, understand the prohibitions it contains as prohibiting a display of images of the Divine or other subjects of worship (*i.e.*, angels) and, perhaps, all images. These views surface in religious liberty litigation. See *Jensen v. Quaring*, 728 F.2d 1121 (8th Cir. 1984), affirmed by an equally divided court, 472 U.S. 478 (1985); *Bureau of Motor Vehicles v. Pentecostal House of Prayer*, 269 Ind. 361, 38 N.E.2d 1225 (1978) (religious objections to photographs on drivers' licenses).

The division of the Commandments in the form used here closely follows the Protestant-Reformed tradition. That interpretation forms "part of [the] violent [Protestant] polemic against what they thought [were] the idolatries of Roman Catholicism." R.H. Charles, The Decalogue (1923) at 76-88. Counting the ban on graven images as a separate Commandment "gave the condemnation of graven images extra

importance .... [I]t was also easy for the reformers to seize on this [Catholic grouping of the Commandments as another example of the dishonesty of the Pope's church." Reformation: A History, *supra*, at 141-42; 252-53. Holbert, *supra*, at 25; J. Phillips, Reformation Of Images, *supra*, at 85, 104-05.

The debate over the incarnation of God in the person of Jesus—which divides Jews from Christians, and Christians from other Christians—depends on this question. So does the question of whether images of God in the person of Jesus or angels are appropriate decorations for a church or proper subjects of devotion. These questions played an important role in the Reformation. See Reformation: A History, *supra*, 539-42. Echoes of these disputes continue to reverberate. They are readily visible by comparing the plain interior of a synagogue or Baptist church with the decorated walls of a Catholic or Russian Orthodox cathedral.

(c) The Sixth Commandment

Jews understand the Sixth (on the count of Lutherans or Catholics, the Fifth[8]) Commandment as prohibiting only murder, G. Blidstein, *Capital Punishment: The Classic Jewish Discussion*, 14 Judaism 159 (1965), not all killings, as the Reformed Protestant King James version, and therefore Texas' monument, has it.

This dispute over translation is of more than passing interest in a country riven with debates over

[8] See *Knapp v. Leonardo*, 46 F.3d 170, 181, n. 1 (2d Cir. 1995) (Oakes, J., dissenting) (noting differences in numeration with regard to this Commandment).

war,[9] abortion and capital punishment. Pacifistic Christian traditions have long pointed to the "not kill" version in support of their pacifism. Reformation: A History, *supra*, at 144 (followers of Ulrich Zwingli in Zurich refused to join army because of this Commandment).

In capital cases defendants' counsel argue that the Ten Commandments' ban encompasses even state sanctioned killings. Prosecutors meet that argument by insisting that the Commandment prohibits only illegal killings—capital punishment not included.[10] These usages, as well as invocations of the Commandment to abortion, have likewise found their way into popular media. See, e.g., *Thou Shall Not Murder* (2004) at www.patrobertson. com/teaching /shallnotmurder.asp

III. RES IPSA LOQUITOR TYPE ANALYSIS IS AN APPROPRIATE METHOD OF DECIDING RELIGIOUS SYMBOL CASES

A. The Ten Commandments Speak For Themselves

Speaking in a negligence case, *Sweeney v. Irving*, 228 U.S. 233, 238-39 (1913), this Court wrote of the doctrine of *res ipsa loquitor*—"the thing speaks for itself; that is to say, if there is nothing to explain or rebut the inference that arises from the way the thing

[9] See, e.g., *Talk of the Nation*, November 11, 2004, www.nexis.com.research/search/documentDisplay/m=e84777419e254flsef92288 (discussing compatibility of war and "Thou Shall Not Kill").

[10] See, e.g., *State v. Hasidlen*, 357 N.C.1, 21-24, 577 S.E.2d 594 (2003); *Bennett v. Angelone*, 92 F.3d 1336 (4th Cir. 1996); *Bracy v. Gramley*, 81 F.3d 1558, 1576, n. 25 (4th Cir. 1989) (Murnahagn, J., dissenting) .

happened, it may fairly be found to have been occasioned by negligence." A permanent display of the Ten Commandments is a thing that speaks for itself, no less than a patient having surgical tools left inside the body after surgery "speaks for itself" of negligence. The rule that the thing speaks for itself is not just a technical rule. It is the embodiment of the common sense insight that some things are as they appear.

Texas' Ten Commandments monument is what it appears to be—a symbol that conveys central ideas of Judeo-Christian religion. It proclaims that God reveals Himself to humans, that he demands exclusive obedience and loyalty, and that He commands certain types of religious and ethical behavior and that there is no discontinuity between the religious and ethical.

B. Texas Has Not Shown That Its Display Is Not What It Appears To Be

Things are not always what they appear to be. Government owned Ten Commandments will not in all circumstances convey a message of official religious preference (and a concomitant message of exclusion). *Lynch*, *supra*. Surrounding circumstances may demonstrate that an object is not the religious statement it appears to be. This demonstration is in the nature of an affirmative defense. The burden of proving the existence and efficacy of secularizing circumstances ought to be on the party asserting them.

The Commandments could constitutionally be displayed in an art museum. There, a displayed object may be religious in origin—an altar triptych, a Madonna and child, or a depiction of the Ten

Commandments—but the government's interest is only its aesthetic value, not its religious import. In a museum, the surroundings, institution's name, the accompanying graphics and the conduct and dress of the visitors, are not those accompanying religious activity. That context unambiguously telegraphs a secular message. The court below properly did not credit Respondents' argument that state capitol grounds functioned as a museum, 351 F.3d at 181.

The text of the Commandments could also constitutionally be displayed in a public school text. There, the context would be constitutionally permissible teaching about religion. *Edwards v. Aguillard*, 482 U.S. 578, 606-07 (1987) (Powell, J., concurring); *Stone*, *supra*.

Then there is the now fabled frieze on the walls of this courthouse—depicting a wide range of lawgivers—including Moses holding the Ten Commandments. But, as Justice Stevens, concurring in part in *County of Allegheny*, *supra*, explained:

> Placement of secular figures alongside these three religious leaders ... signals respect not for great proselytizers but for great lawgivers. It would be absurd to exclude such a fitting message from a courtroom, as it would to exclude religious paintings by Italian renaissance masters from a public museum.

492 U.S. at 652.

Applying the commonsense principle that "the thing speaks for itself" has several advantages over *ad hoc* judicial evaluations. It provides a base rule for

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deciding Ten Commandments cases, and avoids the attendant uncertainty and expense of starting each case from scratch. Likewise, it will discourage the unedifying spectacle of government entities scrambling to create, *ex nihilo*, incredible secular explanations and interpretations.

C. A *Res Ipsa Loquitor* Type Rule Accurately Assesses Religious Purpose And Primary Effect

The "thing is what it is" analysis fits easily within the Establishment Clause analysis that the Court has embraced. The Court inquires into the legitimacy of the government's purposes and, regardless of the government's purposes, an assessment of a practice's effect. *Zelman-Harris v. Simmons*, 536 U.S. 639, (2002); *Pinette*, *supra*; *County of Allegheny*, *supra*; *Wallace v. Jaffree*, *supra*. The nature of these inquiries is discussed in Petitioner's briefs. We do not belabor the details.

(i) The Purpose Asserted Of Honoring The Eagles Are A Sham

If the thing speaks for itself, an intensely religious object inevitably and unavoidably speaks a religious message. The law assumes that people intend the natural consequences of their acts. That presumption is applicable to constitutional claims. *Reno v. Bossier Parish School Bd.*, 520, U.S. 471, 487 (1997); *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977).

Aside from the purpose of demonstrating the foundation of American law, a purpose we have demonstrated cannot sustain the monument,

Respondents urged that the monument honors the Eagles. The gap between the additional asserted purpose of honoring the Eagles for their youth work and the religious means chosen to carry it out (a Ten Commandments display in which there is no mention of that youth work) is so wide as to defeat any connection between the asserted purpose and the monument. This is independent of the substantial claim that where religious means are invoked to serve a secular end, and a secular means would do as well, the choice of religious means is indicative of a religious purpose.

Moreover, the monument bears the inscription "presented to the People" of Texas by the Eagles, not by the people of Texas to the Eagles, as would be expected if the Eagles were being honored. The observer of the monument would see that dedication, not an obscure, legislative resolution honoring the Eagles which contradicts the monument itself.

(ii) The Effect Of Respondents' Display Is To Endorse Religion

The Establishment Clause prohibits actions that have the "effect" of 'endorsing' religion, as well as advancing it in more material ways, *County of Allegheny v. ACLU*, *supra*, 492 U.S. at 592; *Santa Fe ISD v. Doe*, 530 U.S. 290, 308 (2000). The question to be asked is "whether an objective observer, acquainted with the text, legislative history and implementation of the statute, would perceive it as state endorsement of religion." *Santa Fe*, *id.*, 530 U.S. at 308, citing *Wallace v. Jaffree*, *supra*, 472 U.S. at 73, 76 (O'Connor, J., concurring).

"The Establishment Clause forbids a State to hide behind the application of facially neutral criteria and remain studiously oblivious to the effects of its action." *Santa Fe, supra*, 530 U.S. at 307, n. 21.

One of the important debates in American society is between those who seek a polity informed to one degree or another with religious values—and insist that this is the nation's historical tradition—and those who seek a wholly secular polity—and insist that this is the system the Founders' established. The Ten Commandments displayed at Texas' Capitol effectively places a heavy thumb on the scales on one side of that debate. Respondents' display tells citizens what values are prescribed and by Whom.

That message favors one set of religious values (those of the Judeo-Christianity) and, within that broad set, a subset of (Protestant) Christian values. It is not religiously neutral. It is no coincidence that Texas, both currently and when the monument was first accepted, was predominantly Protestant and that the monument reflects that Protestant perspective.

IV. REMOVING THE TEN COMMANDMENTS WOULD NOT ENDORSE SECULARISM

The Fifth Circuit reasoned that "[t]here is no constitutional right to be free of government endorsement of its own laws." 351 F.3d at 182. Whether or not one accepts the divine origin of the Commandments, it held they are "sacred texts to many, [but also] a powerful teacher of ethics, of wise counsel urging a regiment of just governance among free people." This is elegant gibberish.

Some of the rules in the Commandments cannot be Texas' "own laws," which it may endorse. It cannot prohibit idolatry, *Employment Division v. Smith*, 494 U.S. 872, 877-78 (1990); or blasphemy, or taking God's name in vain, *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495, 530-33 (1952), *City of Bellvue v. Lorang*, 140 Wn.2d 19, 922 P.2d 496 (1999), *State v. John W.*, 418 A.2d 1097 (Me. 1980), overruling *State v. Mockos*, 120 Me. 84, 113 A.39 1921), see H. Kalven, A Worthy Tradition: Freedom of Speech In America, 11-13 (1988); or even Sabbath breaking, *McGowan, supra*.

This error was compounded by insistence of the court below that removing the Commandments would amount to a heckler's veto in the hands of those critical of religion. It attacked the straw man of "ruthless separation" of church and state," 351 F.3d at 178. The opinion quoted in support Justice Kennedy's dissent (without noting that it was a dissent) in *County of Allegheny*, and Justice Goldberg's warning in an opinion concurring in a judgment banning Bible reading in the schools, that "government must inevitably take cognizance of religion, *School District of Abington Twshp. v. Schempp, supra*, 374 U.S. at 306. Of course, if the monument was secular as Respondents insist, even "ruthless separation" would not bar its display.

Even leaving aside the fact that one is taken from a dissent, these snippets do not provide a basis for upholding the judgment below. Incendiary phrases like "ruthless separation" are no substitute for analysis of facts and circumstances.

Justice Goldberg for his part demanded that courts distinguish between "mere shadow" and real substance. That is not to relegate practices short of the Inquisition to the shadows. The unvarnished reading of the Lord's Prayer or another excerpt of the student's choosing (such as the Ten Commandments) from a Bible would violated the Establishment Clause according to Justice Goldberg.

The heckler's veto argument is one this Court has repeatedly rejected. *School District of Abington Twshp. v. Schempp*, *supra*, 374 U.S. at 225-26 (footnotes and citations omitted). Accord, *Santa Fe*, *supra*, 530 U.S. at 312.

The Fifth Circuit did not in the end deny that the Commandments are religious; it did not deny that their presence on capitol grounds communicated a religious message (although somewhat inconsistently sought to downplay the significance of that message). It insisted instead, that if government religious speech were banned, the Constitution would be hostile to religion. That might be a reasonable conclusion in some other constitutional system. Not in ours.

CONCLUSION

For the reasons stated, the judgment should be reversed.

Respectfully Submitted,

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ALTERNATIVE NUMBERINGS OF THE TEN COMMANDMENTS* IN DIFFERING FAITHS

Jewish	Augustine	Lutheran and Roman Catholic	The Ten Commandments in Abbreviated Form (Exodus 20:2-17, RSV) (Chap. 20: verse __)		Reformed Christian	Orthodox Christian
1	--	--	2.	I am the Lord your God, who brought you out of the land of Egypt, etc.	--	--
2	1	1	3.	You shall have no other gods before me	1	1
2	1	(omitted or included in 1)	4-6.	You shall not make for yourself a graven image, or any likeness of anything, etc.	2	2
3	2	2	7.	You shall take the name of the Lord your God in vain, etc.	3	3
4	3	3	8-11.	Remember the Sabbath day, to keep it holy. Six days you shall labor, etc.	4	4
5	4	4	12.	Honor your father and mother, that your days may belong, etc.	5	5
6	5	5	13.	You shall not kill.	6	6
7	6	6	14.	You shall not commit adultery.	7	7
8	7	7	15.	You shall not steal.	8	8

* This chart is adopted from W. Harrelson, The Ten Commandments and Human Rights (Fortress Press, 1980), at 49.

Jewish	Augustine	Lutheran and Roman Catholic	The Ten Commandments in Abbreviated Form (Exodus 20:2-17, RSV) (Chap. 20: verse __)		Reformed Christian	Orthodox Christian
9	8	8	16.	You shall not bear false witness against your neighbor.	9	9
10	9 (wife)	9	17(a).	You shall not covet your neighbor's house, etc.	10	10
10	10 (rest of Deut. 5:21	10	17(b).	You shall not covet your neighbor's wife, or his manservant, etc.	10	10
				(Alternative is to use Deut. 5:21, Neither shall you covet your neighbor's wife, etc.		